RECORD AND BRIEFS

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No. 15-214

In the
Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Wisconsin, Division III

REPLY TO THE OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

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INTRODUCTION

St. Croix County opposes the Murrs' Petition on three grounds, none of which have merit. First, the County claims that the Question Presented has already been answered by this Court. That view is far from accurate, and contrary to this Court's own recognition in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) ("this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court"), and *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) ("we have at times expressed discomfort with the logic of this rule"). In *Palazzolo*, this Court expressly recognized the "persistent question of what is the proper denominator in the takings fraction." *Id.* The Court further explained:

> Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the parcel as a whole; but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators. Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari.

Id. Of course, unlike in *Lucas* and *Palazzolo*, the Question Presented by the Murrs places the "parcel as a whole" issue squarely before the Court.

Second, the County asserts that there is "good reason" for refusing to establish specific and bright line rules in regulatory takings cases. Ironically, it is the Wisconsin court below that establishes a "**rule** that

contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." App. at A-11 ¶ 20 (emphasis added). If anything, the County's assertion provides additional reason for this Court to answer the Question Presented.

Moreover, the County misses the point. The question is whether the *Penn Central* "parcel as a whole" concept directs the lower court to rule as a matter of law that two legally distinct parcels, purchased at separate times and for separate purposes, are required to be combined for Takings Clause analysis simply because the parcels are contiguous and commonly owned. This case was decided on summary judgment. There is no factual dispute. The Wisconsin court said that "contiguousness is the key fact" and proclaimed a "well-established rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." Petition at 9 (citing App. at A-10 ¶ 19 and A-11 ¶ 20). The Question Presented provides the Court the opportunity to give much needed guidance regarding the application of the "parcel as a whole" concept to typical residential parcels. For procedural reasons, the Court could not reach that issue in *Lucas* and *Palazzolo*, but now the opportunity to address the issue is properly before the Court, and should now be addressed.

Third, the County contends that the conflict of decisions among the lower courts is due to the divergent facts and circumstances presented by those cases. But the County's discussion actually highlights the conflicting approaches and underscores the need for this Court's guidance.

Although not a reason to deny the Petition, the County also suggests that the Murrs will never win their taking claim on the merits. Regardless of the County's self-serving prediction, the reality is that if the writ of certiorari is granted, and the Wisconsin court is reversed on the "parcel as a whole" analysis, nobody knows what the outcome would be in a trial on remand from this Court. The County's speculation presents no reason to decline this opportunity to finally address the parcel as a whole concept as applied to typical residential parcels.

A final stab by the County suggests that this case is either beyond the statute of limitations, or it is not yet ripe for judicial review. While those problems persist in many takings cases, neither is a problem here. Indeed, because of the clean procedural posture, the Murrs' case is ready for this Court's review.

CORRECTION TO THE COUNTY'S MISSTATEMENT OF FACT

Although the County engages in various factual "spin" efforts, there is one glaring misstatement of fact that needs to be addressed. In its opposition, the County provides its version of the Question Presented, wherein the County characterizes Lot E and Lot F as being "unified in use." This characterization is wrong.

As stated above, this case was decided against the Murrs on summary judgment. The court below acknowledged the undisputed facts as including the following:

> In 1963, the Murrs' parents purchased an adjacent lot, Lot E, which has **remained vacant** ever since. The Murrs allege Lot E was purchased as an investment property,

> with the **intention of developing it separately** from Lot F or selling it to a third party.

App. A-3 ¶ 4 (emphasis added). These are the undisputed facts, which the court below correctly acknowledged must be viewed in the light most favorable to the Murrs. App. A-2 ¶ 3. Indeed, even the County admitted:

> Petitioners' parents originally purchased Lot F in 1960 . . . Soon thereafter, they built a three-season cabin **entirely within the confines of Lot F** which is still used by the Petitioners and their family to this day. The parents subsequently purchased Lot E in 1963. **Lot E was vacant** at the time and **has always remained vacant.**

Brief in Opposition to Petition for Writ of Certiorari at 4 (emphasis added). In short, there is no basis for the County's assertion that there is a unity of use between Lot F and Lot E.

This case provides the needed opportunity to address how to define the horizontal boundaries of land for determining whether there is a regulatory taking. That question has been described by commentators as "the most significant unresolved question" in Takings Clause jurisprudence. John E. Fee, *Of Parcels and Property, in* Taking Sides on Takings Issues: Public and Private Perspectives 101, 102 (Thomas E. Roberts, ed. 2002). *See also* Petition at 21. Because this case was dispensed with on summary judgment, the relevant facts are necessarily undisputed and do not include the County's unsupported assertion that Lot E and Lot F were "unified in use."

ARGUMENT

I

THE "PARCEL AS A WHOLE" CONCEPT PRESENTS A CRITICAL ISSUE OF FEDERAL TAKINGS LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The County argues that *Penn Central* has already adopted the "parcel as a whole" concept and that it has been followed in subsequent decisions by this Court. In support, the County cites *Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470, 498 (1987) (pillars of coal required to be left in place was not a taking); *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993) (withdrawal liability on a pension trust held not a taking); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (no taking resulting from a moratorium that impacted only a "temporal slice" of the fee interest).

The cited cases where this Court has touched on the "parcel as a whole" concept are all in the context of unique property interests and unusual fact patterns where there is an attempt to divide the fee interest into smaller segments (such as a temporal slice), and thereby assert a taking of that smaller segment. Along the same lines, the County could have cited *Penn Central* (alleging a taking of air space) and *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (ban on selling eagle

feathers; destruction of "one strand of the bundle" is not a taking). Most significantly, these cases provide no guidance on how to apply the parcel as a whole concept when the entire fee interest of a discrete and separate parcel is alleged to be taken. Here, the parcel as a whole concept is applied to the Murrs *not to prevent the segmentation of a fee interest, but to aggregate distinct fee interests.* Of course, by aggregating the separate parcels into a "whole" the effect is to utilize the economic use of Lot F (the existing cabin) as a basis for rejecting the taking claim of Lot E. It is this issue, applying the parcel as a whole concept to aggregate typical horizontal divisions of land that exist as separate fee lots but with contiguous and common ownership, that should be addressed by this Court.

> The Supreme Court has thus failed to provide clear guidance to courts on the denominator question—especially in the horizontal cases. Not only has the Court never decided a case involving horizontal division of land, but it has failed to define the "parcel as a whole." Until this issue is resolved, lower courts will continue to face the crucial question: economically viable use of *what* land?

Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535, 1545 (1994). It is urged that the Court now provide that needed guidance.

II

STATE AND FEDERAL COURTS ARE IN SUBSTANTIAL CONFLICT

The County asserts that there is no conflict among the lower courts because they "all involve different facts and circumstances." Brief in Opposition at 21. Of course, different cases certainly involve different facts. But this obvious point does not answer the conflict in the law. The County has no response to the divergent approaches in the law. On one hand, the Wisconsin court below states a "well-established **rule** that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." App. at A-11 ¶ 20 (emphasis added). In contrast, the Florida courts establish the opposite presumption. *Department of Transportation, Division of Administration v. Jirek*, 498 So. 2d 1253, 1257 (Fla. 1986) ("presumption of separateness as to vacant platted urban lots").

There is no need to repeat the variety of cases cited in the Petition showing the conflict among the lower state and federal courts. *See* Petition at 17-21. Indeed, the County's attempt at reconciliation by arguing that the cases involve different facts and circumstances is an implicit acknowledgment of the lack of any coherent or unifying principle regarding contiguous properties in common ownership. It is precisely for this reason that the petition should be granted; so that the lower courts will approach the specific facts of the cases with a consistent understanding of when, if at all, the "parcel as whole" concept should cause the aggregation of distinct parcels of platted lots.

III

THERE ARE NO PROCEDURAL BARRIERS TO GRANTING THE PETITION

The County asserts several theories that are intended to divert the Court's attention from the "parcel as a whole" concept as applied to horizontal divisions of property. But these issues are easily disposed.

First, the County contends that the Petition should not be granted because the Murrs will ultimately lose their takings claim on the merits. Obviously, predictions about how the case would proceed at trial after a remand from this Court should have no bearing on whether the Petition is granted.

Nevertheless, a couple points concerning the merits of the claim are worth rebutting. First, sprinkled throughout its Opposition, the County asserts that the Murrs should have known about the extensive regulations, and that transferring title from the parents to the siblings after the regulations went into effect would diminish their property value. The County apparently believes this assertion has a bearing on the merits of the takings claim. But this Court rejected the "notice" rule in *Palazzolo*.

> [U]nder the proposed [notice] rule the right to compensation may not be asserted by an heir or successor, and so may not be asserted at all.

Palazzolo, 533 U.S. at 627. This language speaks directly to the Murr siblings—the heirs of their parents. The Court continued:

> A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt of an instrument to accord with the duty to compensate for what is taken.

Id. at 628. In short, the County's assertions about notice, and that the Murr siblings should have known about the impact of the regulations, should have no bearing on the merits of their takings claim on a potential remand from this Court.

Second, the County spends considerable time discussing the efforts by the Murrs to redevelop and improve the cabin on Lot F. All of that discussion is irrelevant. The Murrs do not claim a taking of Lot F. They only claim a taking of Lot E, the investment parcel that has remained vacant since the day it was purchased.

Third, the County refers to the appraisal of its expert, Scott Williams. The County is attempting to show that there is not a substantial economic impact from the denial of the Murrs' right to separately develop or sell Lot E. Of course, loss of value goes to the merits of the takings claim which will only be relevant if the Court grants the Petition and reverses the lower court, thus resulting in a remand for trial. Unmentioned is the Murrs' expert who demonstrated a 90 percent lost value in Lot E. This factual dispute between competing appraisers, while relevant on remand, has no bearing on the posture of the case as it is now before the Court.

The County makes two final arguments. The County asserts that the statute of limitations on the

Murrs' taking claim has expired, and the takings claim is not yet ripe for judicial review.

With respect to the statute of limitations, the court below did not address the issue but assumed that the Murrs' claim was timely filed. App. A-7 ¶ 12. This was for good reason. In Wisconsin, a takings claim must be commenced within six years of accruing. Wis. Stat. § 893.52. The County suggests that the takings claim accrued in 1975 when the regulations at issue were adopted, or when the Murrs should have learned of the regulations. The County is wrong.

It is well established that a takings claim accrues "when all the events necessary to fix the alleged liability of the government have occurred and the claimant is legally entitled to bring suit." *Cristina Inv. v. United States*, 40 Fed. Cl. 571, 576 (Fed. Cl. 1998) (quoting *State of Alaska v. United States*, 32 Fed. Cl. 689, 698 (Fed. Cl. 1995)). Of course, the Murrs were not legally entitled to bring suit until they had a ripe claim. *Royal Manor Ltd. v. United States*, 69 Fed. Cl. 58, 61 (2005) ("a regulatory takings claim will not accrue until the claim is ripe"). This required securing a "final decision" of how the regulations will be applied to the property. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). Until there is a final decision regarding how the regulations will be applied, there is not a taking. *United States v. Riverside Bayview Home, Inc.*, 474 U.S. 121, 127 (1985).

Here, the Murrs contended that they were entitled to a grandfather exception that would allow them to develop Lot E separately or, in the alternative, they sought a variance to allow them to develop or sell Lot E. Both of those efforts were unsuccessful. The

grandfather exception was ruled to not apply to the Murrs, and their variance request was denied. *See* Petition at 6 (citing App. at A-2 ¶ 2).

Therefore, at the earliest, their claim ripened on June 28, 2006, when the County board of adjustment denied their variance request to sell or develop Lot E separate from Lot F. At the latest, their claim ripened on May 24, 2011, when judicial review of the grandfather exception and variance denial concluded. The takings claim was filed on March 15, 2012, within six years of either of these events. Accordingly, there is no statute of limitations issue.

Nor is there a ripeness issue. The Murrs allege a taking of Lot E, and only Lot E. They submitted a variance from the regulations to allow development of Lot E. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986) (failure to seek variance may preclude knowing the nature and extent of permitted development). Here, the denial of the applicability of the grandfather exception, and the final decision denying a variance from the regulations, satisfy the ripeness requirements. It is undisputed that the Murrs received a final decision precluding them from separately developing or selling Lot E. Their takings claim is ripe for review.

In short, the County has provided no persuasive reason to deny the Petition.

CONCLUSION

The *Penn Central* "parcel as a whole" concept has never been applied by this Court to a horizontal division of a fee interest in land. Yet, guidance in this

factual context will be most useful to lower federal and state courts, as well as property owners and government regulators who need to know the contours of the Takings Clause. For all the reasons expressed, it is urged that the Petition be granted.

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Respectfully submitted,

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